UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT NO Z-1288207
Issued to: Charles Hardy OGERON, Jr.

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2076

Charles Hardy OGERON, Jr.

This appeal has been taken in accordance with Title 46 United States Code 239b and Title 46 Code of Federal Regulations 5.30-1.

By order dated 25 November 1975, an Administrative Law Judge of the United States Coast Guard at Houston, Texas revoked Appellant's seaman documents upon finding him guilty of the charge of "conviction for a narcotic drug law violation." The specification found proved alleges that while under authority of the document above captioned, on or about 24 August 1972, Appellant was convicted by the Harris County District Court No. 184, Texas, a court of record, for violation of the narcotic drug laws of the State of Texas, to wit, possession of heroin.

At the hearing, Appellant was represented by counsel and entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence four exhibits which included certified copies of the indictment by the Harris County Grand Jury charging Appellant with possession of heroin and the judgment finding Appellant guilty of that charge.

In defense, Appellant offered in evidence four exhibits and the testimony of three witnesses. Appellant also testified in his own behalf.

At the end of the hearing, the Judge reserved decision until after presentation of briefs by Appellant's counsel and the Investigating Officer.

The entire decision and order revoking all seaman's documents issued to Appellant was served on 25 November 1975. Appeal was timely filed on 15 December 1975.

FINDINGS OF FACT

Appellant was convicted of possession of heroin on 24 August 1972 in the Harris County District Court No. 184, Texas, in the case entitled State of Texas vs. Charles Hardy Ogeron while a

holder of Merchant Marine Document No. Z-1288207. Appellant had been represented by counsel at the trial and had plead guilty to the charge.

Appellant was sentenced to three years confinement in the Texas Department of Correction. However, imposition of the sentence was suspended and he was placed on adult probation for three years. After eighteen months, Appellant was determined by the Harris County Court to have satisfactorily served his probationary sentence to that point. It therefore issued an order on May 6, 1974 dismissing the indictment against Appellant and permitted him to withdraw his guilty plea as allowed by Article 46.12, Section 7 of the Texas Code of Criminal Procedure.

The relevant portions of Article 42.12, Section 7, entitled "Adult Probation and Parole Law" state upon the Defendant's satisfactory fulfillment of all probationary conditions the Court in which he was convicted:

> may set aside the verdict or permit the Defendant to withdraw his plea, and shall dismiss the accusation, complaint, information or indictment against such Defendant, who shall thereafter be released from all penalties and disabilities.

However, one exception to the above is that if the Defendant is ever again convicted of a criminal offense, the previous plea of guilty will be made known to that court.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that:

(1) Appellant's conviction in the Harris County District Court was not a final conviction.

(2) The Administrative Law Judge erred in stating that he had no option but to revoke Appellant's license upon a finding that he was guilty of misconduct under 46 U.S.C. 239b.

APPEARANCE: Michael Allen Peters, Esq.

OPINION

I

Appellant contends that Article 42.12, Section 7 of the Texas Code of Criminal Procedure, which permits a Court to set aside the verdict and "dismiss the accusation, complaint, information or

indictment" against a defendant subsequent to satisfying the terms of a probationary sentence, indicates that the original sentence was not intended to be a final conviction. Appellant states that once an order under 42.12, Section 7 has been rendered by a Judge, no mention of the probationary sentence may be made in any future court actions. The Texas Attorney General's opinion of 1973 No. H-48 is quoted as stating that:

> a probated sentence is not a final conviction which would serve to enhance the punishment for a second conviction

Appellant argues that for any purpose under Article 42.12 a "conviction":

> means a final adjudication of guilty by a Court of competent jurisdiction resulting in an unprobated sentence not set aside or reversed.

Appellant states that the only exception to a complete dismissal of the verdict and liabilities occurs if Appellant requests a probationary sentence in a second trial court. In that instance he must inform the court of the prior probationary sentence and would be barred from receiving a probation from the jury.

Appellant maintains that as there are no substantial limitations imposed upon him flowing from the expired probationary period, a final conviction necessary for revocation under 46 U.S.C. 239b has not been rendered.

The relevant portions of 46 CFR §5.03-10, entitled "court convictions in narcotics cases", declare that:

> a conviction becomes final where no issue of the seaman's guilt remains to be decided by the trial court...
>
> After the conviction has become final within the meaning of paragraph (a) of this section, the conditional setting aside or modification of the conviction will not act as a bar to the subsequent revocation of a seaman's document under Title 46, U.S. Code, section 239b

Appellant's argument that he never received a final conviction is without merit. The finality of Appellant's conviction is not altered by the subsequent termination of his probationary sentence. In reference to a jurisdictional question, the United States Supreme Court in Gillespie v. U.S. Steel Corp., Ohio 379 U.S. 148, 85 S.Ct. 308(1964) stated:

> as this Court often has pointed out, a decision final within

> the meaning of §1291 does not necessarily mean the last order to be made on a case.

In Berman v. United States, 302 U.S. 211, 58 S.Ct. 164(1937) the Supreme Court explained:

> placing petitioner upon probation did not affect the finality of the judgment. Probation is concerned with rehabilitation, not a determination of guilt. It does not secure reconsideration of issues that have been determined or change the judgment that has been rendered.

A situation remarkably similar to that at hand is found in Garcia-Gonzales v. Immigration and Naturalization Service, 344 F. 2d 804(1965). This case involved deportation proceedings initiated after petitioner had been found guilty of possession of narcotics and put on probation. After serving his probationary sentence, a Judge ordered a dismissal of petitioner's guilty plea under Cal. Penal Code §1203.4 (West 1972). The dismissal erased all liabilities stemming from the conviction except one barring convicted felons from carrying firearms. Petitioner therefore argued that he could not be deported as there had been no final conviction for possession of narcotics. The court in rejecting petitioner's argument said;

> It is sheer fiction to say that the conviction is `wiped' or `expunged' by [1203.4]. What the statute does is reward the convict for good behavior during probation by releasing certain penalties and disabilities.

Numerous Commandant's Appeal Decisions have reached the same conclusion. See Commandant's Appeal Decisions Numbers 852(LOGAN), 935(LITZ), 954(WHITE), 1746(PREVOST).

Appellant cites several Texas state authorities to support his contention that the conviction is not intended to be final under state law. However, Appellant's citations do not serve to refute the fact that his conviction was not unconditionally dismissed as required by 5.03-10(c). In order to insure a uniform national application of 239b the federal definition of "final" will be applied.

In conclusion, Appellant's contention that the Court ordered modification of his probationary sentence served to prevent a final conviction necessary for revocation under 239b is not valid. Additionally, §5.03-10(a) permits an Investigating Officer to present evidence of a guilty plea to satisfy 239b. On either basis, the revocation of Appellant's seaman's documents was correct.

II

Appellant argues in the alternative that if a final conviction for the purposes of §239b is determined to have been rendered, then the Administrative Law Judge erred in declaring that he had no choice but to revoke Appellant's document. Appellant points out that §239b states the "The Secretary may "... (b) take action" and maintains that this indicates Congressional intent to permit the exercise of discretion by the Judge in the revocation of seaman's documents. However, a review of the legislative history of 239b indicates that Congress intended mandatory revocation for all narcotics convictions. Hearings before the Senate Subcommittee on Interstate and Foreign Commerce on H.R. 8538 held on 16 June 1954, House Report No. 1559 of 4 May 1954, and Senate Report No. 1648 of 28 June 1954 indicate that the only orders to be issued following proof of a narcotics conviction are "deny" and "revoke". "Deny" was not to be used in the same context as a suspension as it referred to those individuals who apply for a seaman's document for the first time and have been convicted of a narcotics offense within ten years prior to the application. Discussion of an order less than revocation was made by the Department of Commerce in relation to H.R. 4777, a predecessor bill to H.R. 8538, by letter of 28 August 1953. However, Congress did not agree with the proposed change from "shall permanently revoke" to "may suspend or permanently revoke." Subsequent revisions, reports and minutes refer only to revocation. (See also Commandant's Appeal Decisions Number 1746 (PREVOST))

In conclusion, the word "may" in 239b refers only to the Secretary's and Investigating Officer's discretion in initiating the hearing. The Judge did not err in stating that he had no choice but to revoke Appellant's documents after finding that he had been convicted of a narcotics violation.

Appellant also contends that the National Transportation Safety Board Decisions in Siler v. Mills, N.T.S.B. Order No. EM-43, Bender v. Moore, N.T.S.B. Order No. EM-39 and Bender v. Packard, 1 N.T.S.B. 2301, all hold that the grant of discretion in 239b does not run solely to the Investigating Officer as to whether or not to prefer charges. However, this contention does not deal with the Judge's lack of discretion in revoking Appellant's license once the Coast Guard hearing has in fact been initiated. Again therefore, the Judge was not mistaken in ordering revocation of Appellant's documents.

III

Appellant cites Siler v. Beroud N.T.S.B. ME-43(1975) which the

Appellant alleges;

> permits in dicta that if other evidence is submitted in behalf of the Appellant as to the circumstances surrounding his receiving of probation on his plea of guilty then the N.T.S.B. could reasonably speculate as to what a jury would do in Appellant's case.

However, speculation as to what either a jury or the N.T.S.B. might have decided if mitigating evidence were presented is of little help to Appellant's case and rendered moot by the fact that the N.T.S.B. affirmed the Commandant's order of revocation.

IV

Appellant maintains that the Judge's issuance of a temporary document illustrates that the Judge did not consider him to be a hazard or unfit for work as a seaman. In response it is pointed out that the issuance of a temporary document was contrary to established policy and Commandant's directives when dealing with cases under 46 U.S.C. 239b. The fact that the Judge was mistaken in issuing a temporary document does not aid Appellant's argument.

V

Appellant states that he pleaded guilty only upon the poor advice of his counsel and that this should be taken into account when considering an order subsequent to a conviction under 239b. However, Appellant's assertion that he was inadequately represented in the trial should be argued in the court of his conviction. An administrative hearing is not the proper forum for a collateral attack upon a state court's decision. Additionally, Appellant's testimony at the hearing in which he related the events leading to his arrest cause me to believe that his conviction was not the result of poor representation.

VI

Appellant finally enumerates several mitigating factors which he states demonstrate the fact that he merits an order less than revocation. However, any evidence which Appellant has regarding his good character and abstinence from hazardous substances should be used in the clemency procedures under 46 CFR §5.13 whereby an evaluation is made for determining the propriety of issuing a new document.

CONCLUSION

Article 42.12, Section 7 of the Texas Code of Criminal

Procedure does not unconditionally set aside a conviction for all purposes as required by 46 CFR 5.03-10(b). The revocation proceeding was based upon evidence of a substantially reliable and probative nature and therefore correct.

ORDER

The order of the Administrative Law Judge revoking Appellant's merchant mariner's document no. Z-1288207, dated 25 November 1975 at Houston, Texas is AFFIRMED.

O. W. SILER
Admiral, U. S. Coast Guard
Commandant

Signed at Washington, D. C., this 20th day of September 1976.

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